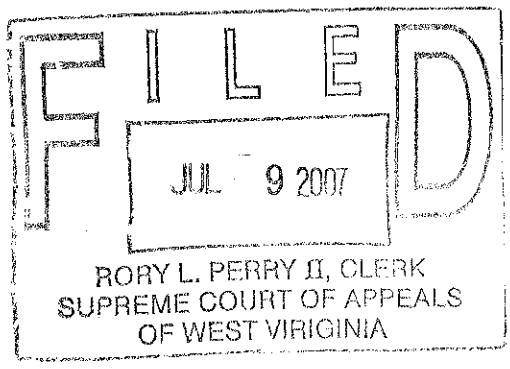
BEFORE THE SUPREME COURT OF APPEALS

OF WEST VIRGINIA

No. 33452



CLARENCE T. COLEMAN ESTATE by Co-Administrators, **CLARENCE COLEMAN** and **HELEN M. ADKINS,**

Appellants,

v.

R.M. LOGGING, INC., a West Virginia Corporation, **CLONCH INDUSTRIES INC.,** a West Virginia Corporation, and **JOHN ROBINSON,** individually,

Appellees.

Appeal from the Circuit Court of Fayette County, West Virginia

---

BRIEF OF APPELLANT

John R. Mitchell (WV BAR #2580)
JOHN R. MITCHELL, L.C.
P. O. Box 353
206 Berkeley Street
Charleston, West Virginia 25322-0353
(304) 346-0307

Joshua I. Barrett (W.Va. I.D. No. 252)
Lonnie C. Simmons (W.Va. I.D. No. 3406)
Heather M. Langeland (W. Va. I.D. No. 9938)
DITRAPANO, BARRETT & DIPIERO, PLLC
604 Virginia Street, East
Charleston, West Virginia 25301
(304) 342-0133

Counsel for Appellants Clarence T. Coleman Estate by Co-Administrators, Clarence Coleman and Helen M. Adkins

Table of Contents

Table of Authorities

West Virginia Cases:

West Virginia Statutes:

Miscellaneous:

BEFORE THE SUPREME COURT OF APPEALS

OF WEST VIRGINIA

No. 33452

CLARENCE T. COLEMAN ESTATE by Co-Administrators, **CLARENCE COLEMAN** and **HELEN M. ADKINS,**

Appellants,

v.

R.M. LOGGING, INC., a West Virginia Corporation, **CLONCH INDUSTRIES INC.,** a West Virginia Corporation, and **JOHN ROBINSON,** individually,

Appellees.

Appeal from the Circuit Court of Fayette County, West Virginia

---

APPELLANT'S BRIEF

I. Kind of Proceeding and Nature of Ruling Below

On December 2, 2003, Clarence T. Coleman, a twenty-four year old logger employed by Appellee, R. M. Logging, Inc. (R.M. Logging), was killed when a felled maple tree lodged in the top of another tree dropped approximately 20 feet and struck him on the left temple and occipital area of his head. Appellants Clarence Coleman and Helen M. Adkins (estate), the parents of the deceased, brought this suit in June of 2005, in the Circuit Court of Fayette County, West Virginia, alleging a deliberate intention claim against R. M. Logging and its manager, John Robinson

(Robinson).

On or about August 16, 2006, R.M. Logging and John Robinson filed a motion for summary judgment claiming that (1) R.M. Logging had no subjective realization of the unsafe working condition, and (2) the estate cannot prove that R.M. Logging had a subjective realization based on a theory of inadequate training or supervision.

The estate responded by directing the lower court's attention to genuine issues of material fact which precluded summary judgment on the deliberate intent claim. Expert testimony, R.M. Logging's and John Robinson's admissions, as well as findings made following the OSHA investigation into the subject incident, satisfied the five-part test set forth in W. Va. Code §23-4-2. Furthermore, summary judgment was inappropriate in view of the filing of a detailed affidavit, pursuant to Rule 56(f) of the West Virginia Rules of Civil Procedure, showing that additional discovery should be allowed. On September 20, 2006, the Honorable Judge Paul M. Blake, Jr., granted R.M. Logging's and John Robinson's motion for summary judgment. It is from this award that the estate brings this appeal.[1]

II. Statement of the Facts

Clarence T. Coleman was killed on December 2, 2003, when a felled maple tree dropped approximately 20 feet and struck him on the left temple and occipital area of his head.[2] Complaint at ¶¶ 13, 14. A wrongful death action was instituted by Appellants as Co-Administrators of the Estate of Clarence T. Coleman, their son. *Id.* at ¶ 2. Depo. of Helen Adkins at 8. At the time of his

---

[1] While Clonch Industries, Inc. was a Defendant in the underlying suit, Clonch was granted summary judgment on the basis of an independent contractor defense. That ruling is not being appealed.

[2] The deceased, Clarence T. Coleman is sometimes referred to as "Amos" in the depositions.

death, decedent was only twenty four years old. *Id.*

Decedent was employed by R.M. Logging to cut timber. Complaint at ¶ 5. John Robinson, Jr., is a certified logger employed by R.M. Logging. Depo. of John Robinson Jr., at 6. His wife is the 100 percent owner of R.M. Logging. *Id.* at 10. Robinson was involved in the decision to hire decedent, whose main job was to cut timber. *Id.* at 46.

The day decedent was killed, he and other employees of R.M. Logging were working on different parts of a hill cutting timber for Clonch. *Id.* at 49. According to OSHA reports filed as a result of this incident, decedent was working in an area where two trees-an 18 inch diameter tree, approximately 50 to 60 feet in height and a 15 inch diameter tree, approximately 45 to 50 feet in height - became lodged in the top of another tree. As decedent was moving from one tree to the other, one of the trees fell on him, causing his death. *See* OSHA incident report.

The only eye witness to this matter is Kelcey Nicholas, who was not a certified logger. Depo. of John Robinson, Jr. at 53-54. Due to difficulties locating Mr. Nicholas, counsel for the estate were never able to take his deposition. Affidavit of John Mitchell. According to Robinson, he learned that decedent had been injured when Mr. Nicholas yelled to him that Mr. Coleman had been hit by a tree. *Id.* at 56-57. After asking another employee to call an ambulance, Robinson administered CPR until the ambulance arrived. *Id.*

As a result of its investigation, OSHA issued eleven (11) citations against R.M. Logging, for violations of mandatory regulations. *Id.* Six of the eleven violations were identified as serious, which means "there is a substantial probability that death or serious physical harm could result" and that the employer knew, or should have known of the hazard. 29 U.S.C. § 666(k).

Specifically, OSHA issued violations against R.M. Logging for the following:

a. Employee training did not consist of the recognition of safety and health hazards associated with the employee's specific work tasks, in violation of 29 CFR 1910.266(i)(3)(iii);

b. Failure to remove dangerous lodged or snagged trees before work was commenced in an area, in violation of 29 CFR 1910.266(h)(1)(vi);

c. Neither hand signals nor audible contact were used whenever noise, distance, restricted visibility, or other factors prevented clear understanding of normal voice communications between workers, in violation of 29 CFR 1910.266(d)(7)(I);

d. Flammable and combustible liquids were not stored, handled, transported, and used in accordance with the regulations, in violation of 29 CFR 1910.266(d)(9)(I);

e. Each machine manufactured after August 1, 1996, did not have a cab that was fully enclosed with mesh material with openings no greater than 2 inches, in violation of 29 CFR 1910.266(f)(3)(vii);

f. Employer failed to assure that each employer, including supervisors, received first aid and CPR training, in violation of 29 CFR 1910.266(i)(7)(I);

g. Employer failed to provide first aid kits at each work site where trees were being cut, at each active landing, and on each employee's transport vehicle, in violation of 29 CFR 1010.266(d)(2)(I);

h. The first aid kits failed to include all of the required items, in violation of 29 CFR 1910.266(d)(2)(ii);

i. Employer failed to develop, implement, and/or maintain at the workplace a written hazard communication program, in violation of 29 CFR 1910.1200(e)(1);

j. Employer failed to maintain copies of the required material safety data sheets for each hazardous chemical in the workplace, in violation of 29 CFR 1910.1200(g)(8); and

k. Employees were not provided information and training on

hazardous chemicals in their work areas, in violation of 29 CFR 1910.1200(h).[3]

Prior to the subject incident, Robinson had not received any training himself into the OSHA regulations relevant to the logging industry. Depo. of John Robinson, Jr. at 16. However, as evidenced by the OSHA report, he was "aware of the requirements for retreat paths, hinge wood, two tree length distance, etc."

The estate's safety expert, Homer S. Grose provided a written report and testified in support of the "deliberate intent" claims against R.M. Logging and John Robinson. Mr. Grose runs a company called Health & Safety Services and provides expert testimony on a regular basis involving work place safety, and he is certified by OSHA to train others on safety issues. Depo. of Homer Grose at 4-5; Grose curriculum vitae. Mr. Grose has worked in safety around logging and timbering operations for approximately 40 years. Depo. of Homer Grose at 20. He has received specific training on regulations governing logging. *Id.*

Mr. Grose noted that Mr. Coleman was not a certified logger and he did not have much experience in the timber industry. *Id.* at 14. Based upon his review of the facts, including the facts found by OSHA in their investigation of R.M. Logging, Mr. Grose concluded that Mr. Coleman had not been provided the specific training required by OSHA regulations in the logging industry. *Id.* When asked why Mr. Coleman walked under the tree that was lodged in another tree, Mr. Grose concluded, based upon the evidence reviewed, that Mr. Coleman had not been trained as to the hazards presented in that situation. *Id.* at 39.

---

[3] Although several of these serious violations involved issues not directly relating to the death of Mr. Coleman, these violations nevertheless are indicative of R.M. Logging's failure to comply with the applicable rules and regulations governing workplace safety.

In expanding on the importance of safety training, Mr. Grose explained:

> First, he wasn't trained to know the hazards . . . That would be the first thing. I don't think he had a full understanding of the hazard that was presented by the situation and that's not uncommon. You're not born with that kind of knowledge. You cannot-haven't had any experience or been trained in it, you're not born with that kind of information-on your computer. You have to be trained and he hadn't received any training. Another way it could have been prevented if-a supervisor should have been supervising employees in a hazardous situation such as that.
>
> If he was running a dozer or running equipment, he's not supervising. He's got one of the most important parts of that job go unsupervised, just run itself and what added to the gravity of that situation is people that was not-were not trained properly. *Id.* at 41-42.

Mr. Grose stated that cutting timber can be one of the most hazardous industries based upon the frequency of serious penalties. *Id.* at 43. In his report, Mr. Grose concluded:

> It is the writer's opinion that unsafe working conditions existed at the Cannelton Hollow Logging worksite operated by R.M. Logging, Inc. at about 12:30 p.m. on Tuesday, December 2, 2003 that presented a high probability of serious injury or death due to R.M. Logging's failure to comply with mandatory safety regulations that contributed to the crushing injuries that resulted in the death of Clarence Amos Coleman when he walked beneath a 15-inch diameter hickory tree, approximately 45-50 feet in length, that had been felled but was suspended about twenty (20) feet above ground level due to a 4-inch to 6-inch diameter limb that prevented the tree from falling to the ground. (A violation of Title 29 CFR, Part 1910. Section 1910.266(h)(I)(vi). When Mr. Coleman walked beneath the suspended tree, the tree fell striking him in the left temple and occipital area of the head resulting in fatal injuries. Grose report at 4.

Mr. Grose further concluded:

> Information reviewed indicates that logging is one of the most hazardous industries and that Clarence A. Coleman was left on the Cannelton Hollow Road logging worksite in an unsupervised area where specific unsafe working conditions existed with the employer

> knowing that Mr. Coleman, timber cutter, was a novice logger, and should not intentionally be left alone or exposed to unsafe working conditions that are normally prevalent. Normally Mr. John Robinson, foreman at Cannelton Hollow Road worksite, operated the dozer which prevented close supervision of the xis (6) [sic] employees that formed the logging crew. *Id.* at 4-5.

Robinson, admitted that it would be an unsafe working condition to send a man in to do a logging job without first training him. Robinson Depo. at 66.

On or about August 25, 2006, a hearing was held on R.M. Logging's motion for summary judgment. Thereafter, on or about September 20, 2006, Judge Blake granted the motion finding that the estate had not proven subjective realization of the unsafe working condition. Judge Blake's Order at ¶ 7.

III. Issues Presented

> *Whether the Circuit Court erred in granting Appellees' Motion for Summary Judgment where (1) All genuine issues of material fact were resolved in favor of Appellees; (2) Genuine issues of material fact remained in dispute as to Appellees' subjective realization of an unsafe working condition; and (3) The Circuit Court granted summary judgment prior to allowing Appellants to conduct discovery, as evidenced by an affidavit attached to the response to the Motion for Summary Judgment*

IV. Argument

> *The Circuit Court erred in granting Appellees' Motion for Summary Judgment where (1) All genuine issues of material fact were resolved in favor of Appellees; (2) Genuine issues of material fact remained in dispute as to Appellees' subjective realization of an unsafe working condition; and (3) The Circuit Court granted summary judgment prior to allowing Appellants to conduct discovery, as evidenced by an affidavit attached to the response to Appellees' Motion for Summary Judgment*

A. Standard of Review

In reviewing a circuit court's order granting summary judgment, this Court applies a *de novo* standard. Syllabus Point 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E. 2d 755 (1994). "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W. Va. 160, 133 S.E. 2d 770 (1963). "The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Syllabus Point 3, *Painter v. Peavey*, 192 W. Va. 189, 451 S.E. 2d 755 (1994). Evidence related to a material fact should be viewed in the light most favorable to the nonmoving party. *See, Gentry v. Magnum*, 195 W. Va. 519, 466 S.E. 2d 451 (1995).

B. The Circuit Court Erred in Granting Summary Judgment By Failing to Look at the Evidence in the Light most Favorable to Appellants

Rather then examine the evidence presented as to genuine issues of material fact in the light most favorable to the nonmoving party, here the estate, the lower court essentially turned the summary judgment standard on its head and resolved all disputes in favor of R.M. Logging and Robinson, while simultaneously ignoring all evidence presented by the estate. In the OSHA investigation following this incident, it was specifically found that "[e]mployees are not trained in the recognition of safety and health hazards in their work area. The employees have never been shown the requirements of this standard."

Robinson was aware of safety precautions that his workers should have been implementing on the date of this incident. He knew the regulations in regards to hinging and two tree length distances. Furthermore, he was fully aware of the dangerous nature of the timber cutting profession.

Yet, even with all this knowledge, decedent was never trained to recognize these same hazards. Robinson knew of these dangerous conditions, he knew of regulations that may very well have saved decedent's life if he had been properly trained to recognize and avoid these risks.

OSHA specifically found that the employees were not trained to recognize the hazards presented at a logging site. Despite OSHA's findings, the lower court found:

> Plaintiffs assert that Decedent was not properly trained in order to understand that he should not walk under a hanging tree. However, Plaintiffs have no evidence to offer the Court concerning what training Decedent actually had. Plaintiffs assert that because this tragic accident occurred that, *ipso facto*, the Decedent was not properly trained.[4] Order at Finding of Fact ¶ 6.

The lower court further found:

> Although OSHA issued several citations to R.M. Logging, Inc. as a result of this accident, the Court finds that OSHA citations do not equate with lack of training or with subjective realization. Further, such citations do not equate to a finding of deliberate intention on the part of R.M. Logging to injure the Decedent. *Id.* at ¶ 7.

Finally, the lower court ruled:

> Training is not required for a person of ordinary intelligence to recognize the hazard of walking under a tree suspended in the air by a limb from another tree." *Id.* at Conclusion of Law ¶ 11.

The lower court completely disregards the fact that OSHA issued citations to R.M. Logging and Robinson as a result of this incident which specifically state that this incident was caused, in part, by lack of training. As evidenced by OSHA issued citations, training is needed to recognize and avoid hazardous situations such as this. However, the lower court discounted OSHA's findings,

---

[4] The lower court makes a similar statement in its Order in the Conclusions of Law ¶ 10, "Plaintiffs' conclusion or allegation that Decedent was not properly trained simply because an accident happened is insufficient proof as a matter of law."

and resolved all factual disputes in favor of R.M. Logging and Robinson.

For instance, the lower court found that training was not required to teach an employee not to work under trees which had become snagged in the tops of adjacent trees. This finding was certainly in error. Not only is it an obvious violation of the principle that inferences must be taken in favor of the non-moving party; it directly contradicts the requirements established by OSHA regulations, or, at the very least treats these legal requirements as unnecessary. There are detailed and specific OSHA requirements governing the logging industry. One such standard specifically requires work to cease in an area if a danger tree is present.

> Each danger tree shall be felled, removed or avoided. Each danger tree, including lodged trees and snags, shall be felled or removed using mechanical or other techniques that minimize employee exposure before work is commenced in the area of the danger tree. If the danger tree is not felled or removed, it shall be marked and no work shall be conducted within two tree lengths of the danger tree unless the employer demonstrates that a shorter distance will not create a hazard for an employee.

29 C.F.R. 1910.266(h)(vi). OSHA specifically recognizes this hazard, and further recognizes the necessity for employers to train employees to understand, appreciate and prevent these hazards.

> . . . At a minimum, training shall consist of the following elements: . . . (iii) Recognition of safety and health hazards associated with the employee's specific work tasks, including the measures and work practices to prevent or control these hazards.

29 C.F.R. 1910.266(i)(3)(iii).

Indeed, OSHA specifically found that R.M. Logging and Robinson had violated these regulations relating to training employees to recognize risks, and failing to completely fell snagged trees before commencing work in an area. Moreover, R.M. Logging and Robinson paid these fines, admitting to their guilt. Yet incredibly, the lower court substituted its own judgment for that of

OSHA in finding that training is not necessary. The lower court disregarded these OSHA standards, as well as OSHA's findings following an investigation into the job site. This was outright error, and at the very least deprived the jury of the right to consider the evidence that, taken in the light most favorable to the estate, would justify a finding of liability.[5]

C. *The Circuit Court Erred in Granting Summary Judgment Where Genuine Issues of Material Fact Remained in Dispute as To Appellees' Subjective Realization of an Unsafe Working Condition*

This Court recently ruled on the precise issue governing this appeal. Namely, the lower court ruled that the estate had not presented sufficient evidence to show subjective realization of the unsafe working condition. As this Court ruled, whether an employer has a subjective intent must typically be proved by circumstantial evidence from which conflicting inference may be drawn.

> "Under [W. Va. Code § 23-4-2(c)(2)(ii)], whether an employer has a 'subjective realization and appreciation' of an unsafe working condition and its attendant risks, and whether the employer intentionally exposed an employee to the hazards created by the working condition, requires an interpretation of the employer's state of mind, ***and must ordinarily be shown by circumstantial evidence, from which conflicting inferences may often reasonably be drawn***." Syllabus Point 5, *Ryan v. Clonch Industries, Inc.*, 219 W. Va. 664, 639 S.E. 2d 756 (2006).

In *Ryan*, the plaintiff had been rendered blind in one eye when a sharp piece of metal binding struck him in the eye. *Id.* At the time of the occurrence, the plaintiff was not wearing safety glasses, and the defendant did not require the use of safety goggles. *Id.* The defendant argued that the plaintiff was unable to produce evidence that any Clonch supervisor believed that this was an unsafe working condition that posed a high degree of risk and a strong probability of serious injury. *Id.*

---

[5] Moreover, the Court's finding appears to be a suggestion that the decedent was guilty of comparative or contributory negligence, which is irrelevant to a deliberate intent claim, such as here. Syllabus Points 8, 9, *Roberts v. Consolidation Coal Co.*, 208 W. Va. 218, 539 S.E. 2d 478 (2000).

In rejecting this argument, this Court found that the defendant's were under a mandatory duty to perform hazard evaluations. *Id.* The defendants' failure to perform its mandatory duty to perform a hazard evaluation pursuant to OSHA regulations, along with the defendant's admission of the same, was sufficient to satisfy the subjective realization requirement. *Id.* This Court found that the defendant's conduct in simply ignoring its mandatory duty to perform hazard evaluations, and then claiming it had no subjective realization to be unconscionable. *Id.* Had the defendant complied with the requirement of performing a hazard evaluation, it would either have had documented evidence to support its claim that the activity was not hazardous, or it would have discovered hazards and would have been under a duty to provide protective measures. *Id.* The defendants chose to disregard its duty to perform hazard evaluations, and chose to conduct itself, as this Court noted, "like the proverbial ostrich who sticks his head in the sand to avoid seeing the obvious . . ." *Id.* (quoting, *State ex rel. League of Women Voters of West Virginia v. Tomblin*, 209 W. Va. 565, 578, 550 S.E. 2d 355, 368 (2001). Accordingly, the defendant was estopped from claiming it had no subjective realization of an unsafe working condition. *Id.*

Similarly, in this case, R.M. Logging and Robinson are under a mandatory duty to train employees on the specific hazards associated with their work. Specifically, 29 CFR 1910.266(i)(3)(iii) provides, "[a]t a minimum, training ***shall*** consist of the following elements: . . . Recognition of safety and health hazards associated with the employee's specific work tasks, including the use of measures and work practices to prevent or control those hazards . . ." R.M. Logging and Robinson were found to be in violation of this provision after OSHA's investigation

of the incident.[6] Specifically, the OSHA reports stated "[e]mployees are not trained in the recognition of safety and health hazards in their work area. The employees have never been shown the requirements of this standard." Furthermore, the Estate's expert specifically found that the workers, like decedent, were not properly trained to recognize the hazards presented on a logging site. Accordingly, as in *Ryan*, adequate proof establishes that R.M. Logging and Robinson failed to perform a mandatory duty under OSHA's provisions. Accordingly, they are now estopped from claiming they had no subjective realization of the unsafe working condition.

Testimony from Robinson and Mr. Grose, the fact that Mr. Coleman was essentially a novice timber cutter, and the serious violations issued by OSHA after investigating this accident all demonstrate the subjective realization of an unsafe working condition. As in *Ryan*, Robinson conceded that it would be an unsafe working condition to send an untrained person to perform work in the logging industry.

Mr. Grose concluded that the failure to train the employees as required by regulation and to supervise their work created an unsafe working condition.[7] Mr. Grose further opined that the estate had satisfied all five elements found in the deliberate intent statute. OSHA's issuance of at least six

---

[6] OSHA actually gave eleven (11) citations following its investigation. While a number of these citations also demonstrate the subjective realization of an unsafe working condition, the Estate will not address each separately.

[7] Although R.M. Logging and Robinson devoted a substantial amount of their brief in response to the Petition for Appeal, to the qualifications of the Estate's expert, such is not a matter before the Court. Indeed, any attack on the expert's credentials would be more appropriate for cross examination. The lower court never ruled on the referenced motion to exclude Mr. Grose's testimony. To the extent that R.M. Logging and Robinson intend to rely on arguments attacking his credentials, such argument is inappropriate, and indeed irrelevant to the issues presented in this appeal. At most, these arguments simply reveal their interpretations of Mr. Grose's report and testimony. The Estate strongly disagrees with these assertions, revealing further questions of fact.

serious violations, as a result of this accident, including violations regarding the lack of safety training provided by R. M. Logging, and Robinson, clearly establishes that an unsafe working condition existed. The definition of a "serious" violation, under OSHA, is that "there is a substantial probability that death or serious physical harm could result" and that the employer knew, or should have known of the hazard. 29 U.S.C. §666(k)). Thus, under this definition, OSHA cannot issue a serious violation unless the facts demonstrate that the unsafe working condition noted by the inspectors involved a substantial probability that death or serious physical harm could result.

Despite the evidence presented illustrating subjective realization of this unsafe working condition, Judge Blake ruled in his order that "[t]he Court concludes, as a matter of law, that there is no evidence in this case to meet the requirement of subjective realization, as there is no evidence that R.M. Logging, Inc. was aware of the suspended tree, and that Decedent would walk underneath it." See order at p. 5, ¶ 7. Nowhere in his order does the lower court explain why it is disregarding The Estate's evidence, why it is disregarding the fact that Robinson admits that utilizing an untrained worker is dangerous, or why it is disregarding OSHA's findings.

The lower court's legal analysis construes the requirements too narrowly. The Estate is not required to prove that R.M. Logging and Robinson had knowledge of the actual tree which was suspended. The lower court ruled:

> Plaintiffs have failed to produce any evidence that R.M. Logging, Inc., through its supervisor, John Robinson, was aware that Decedent had felled a tree which became stuck and that Decedent would choose to walk under that tree. Further, no evidence was produced showing that it was the custom, habit or practice of R.M. Logging to require its employees to routinely pass under suspended trees.

However, the unsafe working condition is not this particular suspended tree. Rather, as noted by

both the Estate's expert as well as the OSHA investigation, the unsafe working condition consisted of **the lack of training**.[8] The suspended tree, this hazard, is the direct manifestation of this lack of training. It is this lack of training that created the specific fatal harm to the plaintiff. Moreover, Robinson was aware of safety requirements related to hinged trees and two tree length distances, yet failed to properly train his employees to recognize those dangers, as evidenced by both the OSHA report and expert testimony.

Aggravating these dangers, decedent, while only a novice cutter, was allowed to work unsupervised in the woods. Not only was he untrained, but he was unsupervised. This fact, favorable to the plaintiff's theory, is notably absent from the lower court's order. Clearly, sufficient evidence has been presented to raise genuine issues of material fact. Simply stated, the lower court was bound to resolve all inferences in favor of the non-moving party, but did the exact opposite by resolving all inferences in favor of R.M. Logging and Robinson. It simply disregarded the Estate's evidence.

This Court has recognized, on multiple occasions, that litigants can fulfill the subjective realization requirement contained in W. Va. Code § 23-4-2 through circumstantial evidence. In *Nutter v. Owens Illinois, Inc.* 209 W.Va. 608, 550 S.E.2d 398 (2001), this Court reversed the circuit court's award of summary judgment to a defendant who contended that the plaintiff could not prove a subjective realization and appreciation of the unsafe condition or that the defendant had intentionally exposed the plaintiff to it. In *Nutter*, it was asserted that because there had been no prior incidents or complaints about the dangerous condition of the equipment, which had produced

[8] Indeed, this Court has recognized a deliberate intention cause of action to be supported, in part, by allegations of lack of training. *See, Mayles v. Shoney's, Inc.*, 185 W. Va. 88, 405 S.E. 2d 15 (1990).

elevated carbon monoxide levels, injuring the plaintiff, the "subjective appreciation" and "intentional exposure" elements were missing. The Court, however, found the requisite elements proven by circumstantial evidence that the defendant knew some of its equipment was putting out excessive levels of carbon monoxide and that elevated levels had previously been found in offices adjoining (but not in) the area where the plaintiff was required to work.

In *Sias v. W-P Coal Co.*, 185 W. Va 569, 575, 408 S.E.2d 321, 327 (1991), this Court noted:

> (t)he fact finder ... reasonably may infer the intentional exposure if the employer acted with the required specific knowledge ("subjective realization" and appreciation of a specific unsafe working condition violative of a specific safety standard) and intentionally exposed the employee to the specific unsafe working condition. *Handley v. Union Carbide Corp.*, 620 F. Supp. 428, 439 (S.D. W.Va. 1985), (Haden, C.J.) *f'd*, 804 F.2d 265 (4th Cir. 1986) (Sprouse, J., writing for three-judge panel).

As noted in *Costilow v. Elkay Mining Co.,* 200 W. Va. 131, 134, 466 S.E.2d 406, 409 (1997), the leading case of *Mayles v. Shoney's Inc.,* 185 W.Va. 88, 405 S.E.2d 15 (1990), establishes that the subjective realization requirement of W.Va.Code §23-4-2(c)(2)(ii), may be satisfied by showing that company managers were aware of an unsafe practice yet failed to take remedial action. Further *Mayles* and its progeny establish that an employer's common practice may amount to intentional exposure. *See Cecil v. D & M, Inc.* 205 W.Va. 162, 170, 517 S.E.2d 27, 35 (1999).

The failure of an employer to provide the safety training required by OSHA has likewise been found sufficient to sustain a claim under the deliberate intent statute. For example, in *Arnazzi v. Quad/Graphics, Inc.*, 218 W.Va. 36, 621 S.E.2d 705 (2005), this Court reversed a summary judgment order granted in a case where the employer had failed to provide safety training to a forklift operator that was required by OSHA regulations. Similarly, in the present case, OSHA cited R. M.

Logging for failing to provide adequate employee training designed to teach these employees to recognize and prevent the specific safety and health hazards associated with the logging industry. This decision provides further support for the Estate's claim that summary judgment was inappropriate under these facts.

As demonstrated by the foregoing facts, coupled with the expert testimony regarding the unsafe working condition and the very specific OSHA regulations and accepted safety standards violated by R. M. Logging and Robinson, it is abundantly clear that this second element of W.Va.Code § 23-4-2(c)(2)(ii) is met, either directly or circumstantially. Accordingly, summary judgment was inappropriate.

D. The Circuit Court Erred in Granting Summary Judgment Prior to Allowing Appellants To Conduct Discovery as Evidenced by an Affidavit Attached to the Response to Appellees' Motion for Summary Judgment

Finally, the circuit court erred in refusing to allow additional time to conduct discovery in responding to the motion for summary judgment. Attached with the Estate's response to the motion for summary judgment was an affidavit executed by John Mitchell. This affidavit was filed pursuant to Rule 56(f) of the West Virginia Rules of Civil Procedure, and set forth that the Estate had been unable to depose a Kelcey Nicholas due to problems locating him.[9] Mr. Nicholas was the only eye witness to the incident.

Here, the Rule 56(f) motion should have been allowed.

---

[9] Although R.M. Logging and Robinson, in their response to the Petition for Appeal, argue that the Estate was somehow dilatory in noticing this deposition after Mr. Nicholas had finally been found, this assertion ignores reality. Mr. Nicholas was not located until the end of July, 2006, shortly before the dispositive motion deadline. Accordingly, in addition to pointing out that they had not had an opportunity to depose Mr. Nicholas in the response to the motion for summary judgment, counsel also submitted to the lower court two proposed orders delaying rulings on the motions until Mr. Nicholas could be deposed.

> Summary judgment is appropriate only after the opposing party has had adequate time for discovery. A decision granting summary judgment before the completion of discovery is precipitous. Rule 56(f) provides the appropriate relief when a party needs additional information or time to respond to a motion for summary judgment. Under the rule a continuance of a summary judgment motion is mandatory, upon a good faith showing by a filed affidavit that the continuance is needed to obtain facts essential to justify opposition to the motion.

Cleckley, Franklin D., Davis, Robin J., Palmer, Louis J. Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure*, Second Edition, Juris Publishing, Inc. 2006, §56(f) Affidavits Unavailable, p. 1276. Mr. Nicholas' deposition would undoubtedly be probative of the issues raised in R.M. Logging and Robinson's summary judgment motion. Accordingly, the Estate should have been given an opportunity to depose Mr. Nicholas prior to the lower court granting summary judgment.

V. Conclusion

For all the foregoing reasons, the Estate respectfully ask the Court to grant **APPELLANTS' APPEAL**, Schedule his Appeal on the Argument Docket, Reverse the Order of Judge Blake granting summary judgment to R.M. Logging and Robinson, and Remand this case to the trial court for jury consideration.

CLARENCE T. COLEMAN ESTATE by
Co-Administrators, **CLARENCE COLEMAN** and **HELEN M. ADKINS,** Appellants,
--By Counsel--

John R. Mitchell (WV BAR #2580)
JOHN R. MITCHELL, L.C.
P. O. Box 353
206 Berkeley Street
Charleston, West Virginia 25322-0353
(304) 346-0307

Heather M. Langeland

Joshua I. Barrett (W.Va. I.D. No. 252)
Lonnie C. Simmons (W.Va. I.D. No. 3406)
Heather M. Langeland (W. Va. I.D. No. 9938)
DITRAPANO, BARRETT & DIPIERO, PLLC
604 Virginia Street East
Charleston, West Virginia 25301
(304) 342-0133

CERTIFICATE OF SERVICE

I, Heather M. Langeland, do hereby certify that on the 9th day of July, 2007, a copy of the foregoing **BRIEF OF APPELLANTS** was served on counsel of record through the United States Postal Service, to the following:

Eric Waller
STEPTOE & JOHNSON, PLLC
Bank One Center, Eighth Floor
P.O. Box 1588
Charleston, West Virginia 25326-1588

Mary Sanders
HUDDLESTON, BOLEN, LLP
P.O. Box 3786
Charleston, West Virginia 25330-3786

Heather M. Langeland

Heather M. Langeland (WV BAR #9938)
DITRAPANO, BARRETT & DIPIERO, PLLC
604 Virginia Street, East
Charleston, WV 25301